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IN THE

SUPREME COURT OF THE UNITED STATES.

TERM—1968.

No. 1296

JOHN BURTON MOODY, M. D.,
Petitioner,

v.

UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for for the Sixth Circuit.

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To the United States Court of Appeals for for the Sixth Circuit.

Petitioner, John Burton Moody, M. D., prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit, entered in this case on March 7, 1968.

OPINION BELOW.

The petitioner has twice been tried in the United States District Court for the Western District of Tennessee; in neither instances was an opinion of the District Court officially or unofficially reported. The opinion of the Court of Appeals reversing the conviction of petitioner upon his

first trial is reported at 339 F. 2d 161 (1964). The opinion of the Court of Appeals affirming petitioner's second conviction, but remanding the case to the District Court for a reconsideration of the sentence imposed in light of its recommendation is reported at 371 F. 2d 688 (1967). The opinion of the Court of Appeals on March 7, 1968 (App. p. 40), is not yet officially reported.

JURISDICTION.

The judgment of the Court of Appeals was entered on March 7, 1968 (App. p. 40). The jurisdiction of this Court is invoked under 28 U. S. C., § 1254 (1).

QUESTIONS PRESENTED.

The petitioner was indicted, twice tried and twice convicted, and his conviction at his second trial has been affirmed, upon an indictment charging wilful evasion of less than $6,500.00 in federal income taxes over a four-year period, in violation of § 7201 of the Internal Revenue Code of 1954, 26 U. S. C., § 7201. The Court of Appeals in affirming petitioner's second conviction remanded the case to the District Court for reconsideration of the prison sentences imposed stating that it appeared that sentences totaling less than half of the sentence actually imposed would satisfy the federal interest in the violation of its tax laws. The questions presented for review by this petition are:

Whether or not the District Court's refusal to reduce the sentence in accordance with the direction of the Court of Appeals on the grounds that the sentence was imposed under Title 18, § 4208 (a) (2) and because that under such sentence it is highly unlikely that the defendant would have to serve more than eight months, constitutes an unconstitutional delegation of judicial authority.

Were the defendant's rights under the Sixth Amendment to the Constitution of the United States violated when the District Court refused to reduce the defendant's sentence in accordance with the mandate of the Court of Appeals on the ground that from information contained in the presentence report the defendant deserved some imprisonment; when such conclusion was based upon hearsay statements made by unknown persons about charges of which the defendant had never been accused?

Does the sentence imposed in view of the nature of the offense and the small amount of tax involved constitute cruel and unusual punishment in violation of the defendant's rights under the Eighth Amendment to the Constitution of the United States?

STATUTES INVOLVED.

The only statute involved in this petition is the so-called "indeterminate sentence" provision of Title 18, U. S. C., § 4208 (a)(2):

> "(2) The Court may fix the maximum sentence of imprisonment to be served in which event the Court may specify that the prisoner may become eligible for parole at such time as the board of parole may determine."

STATEMENT.

The indictment charges the petitioner, a physician, with wilful evasion of $6,547.45 federal income tax over the period 1956-1959. On conviction at his second trial, petitioner was fined $6,000.00 and was sentenced to five year concurrent sentences on each count of the indictment. The Court of Appeals, affirming the conviction, remanded the case to have the prison sentences reconsidered in light of the Court of Appeals' recommendation that, absent a prior felony record, sentences totaling less than half the

sentences actually imposed would satisfy the federal interest in the violation of tax laws in the record.

In accordance with the opinion of the Court of Appeals petitioner filed a motion for reduction of sentence under Rule 35, Fed. R. Crim. P. (R. 3a). A hearing was held and the Court took the motion under advisement and subsequently rendered a memorandum decision wherein the petitioner's motion was denied (R. 28a). The Court of Appeals held:

1. The action of the District Court in refusing to reduce the sentence in accordance with the Court of Appeals instruction was not an abuse of that court's discretion.

2. The action of the District Court in considering rank hearsay statements contained in the petitioner's pre-sentence report, charging him with two serious crimes of which the petitioner has never been indicted, tried or convicted, did not violate the petitioner's constitutional rights.

3. The action of the District Court in refusing to reduce petitioner's sentence for reason that the sentence was imposed under the provisions of 18 U. S. C., § 4208 (a) (2), was not an unconstitutional delegation of judicial authority.

4. The Court of Appeals did not rule upon whether or not the sentence imposed in view of the nature of defense and the small amount of tax involved constitutes cruel and unusual punishment in violation of petitioner's rights under the Eighth Amendment to the Constitution of the United States.

REASONS FOR GRANTING THE WRIT.

1. The length to which a trial court may go in delegating its judicial responsibility in sentencing to the parole board or some other executive branch of the gov-

ernment presents a novel question which has not heretofore been clearly passed upon by this court. A strict and rigid enforcement of the separation of the judiciary from other branches of the government is the cornerstone in the foundation of our constitutional system.

In its memorandum decision (R. 28a) (App. p. 35), denying defendant's motion to reduce the sentence imposed, the Trial Court stated:

> ". . . The sentence as imposed, under Sec. 4208 (a) (2) is an indeterminate sentence a fact not expressly recognized in the opinion of the Court of Appeals. In any event, we know from experience that, such being the case, the length of time defendant will actually be incarcerated will depend little, if any, on the length of the sentence, and that under this sentence, it is highly unlikely that defendant will serve more than eight months."

In refusing to reduce the defendant's sentence as per the Court of Appeal's recommendation, the District Court placed a great reliance upon the fact that the defendant had been sentenced under the so-called "indeterminate sentencing provision", Title 18, Sec. 4208 (a) (2), which would, as the Court felt, probably mean that the defendant would not have to serve more than eight months of actual jail time.

The District Court unwarrantedly assumed that the Court of Appeals had not considered the fact that this sentence had been imposed under Sec. 4208 (a) (2) and unwarrantedly assumed that the Court of Appeals recommendation was made without knowledge of the facts under which this sentence was imposed or that the Court of Appeals was not cognizant of the effect of a sentence imposed until Title 18, U. S. C. A., § 4208 (a) (2).

The Court of Appeal's recommendation that a sentence totaling less than half of the sentence actually imposed

would satisfy the federal interests in the violation of its tax laws was made after a consideration of all the record including the judgment under which this defendant was sentenced. There is nothing in the record, nor in the Court of Appeal's opinion which warranted the District Court's assumption that the recommendation was made without knowledge that the sentence was imposed under Sec. 4208 (a) (2) and that notwithstanding that fact, the sentence actually imposed was, in view of the offense committed, too severe, absent some information in the defendant's presentence report showing prior felony convictions warranting the imposition of such a severe sentence. The defendant's presentence report contains no evidence of any prior convictions (R. 18a).

The imposition of a sentence imposed, not in view of the offense committed, but imposed on the basis of the length of time that a defendant might have to serve before he would be granted parole is an unconstitutional delegation of judicial responsibility to the executive department.

One of the cardinal and fundamental principles of the American Constitutional System is a strict and rigid enforcement of the division of powers between the three branches of government.

This Court long ago stated the importance of maintaining this principle.

> "The Constitution, in distributing the powers of government, creates three distinct and separate departments—the legislative, the executive and the judicial. This separation is not merely a matter of convenience nor of governmental mechanism. Its object is basic and vital, **Springer v. Philippine Islands**, 277 U. S. 189, 201, 72 L. Ed. 845, 849, namely, to preclude the commingling of these essential different

powers of government in the same hands, and this object is nonetheless apparent in controlling because there is to be found in the Constitution an occasional specific provision conferring upon a given department, certain functions, which, by their nature, would otherwise fall within the general scope of the powers of another. Such exceptions serve rather to emphasize the generally inviolate character of the plan.

"It would be important, thus, to separate the several departments of government and restrict them to the exercise of their appointed powers, it follows, as a logical corollary, equally important, that each department should be kept completely independent of the others—independent not in the sense that they shall not co-operate in economy and carrying into effect the purposes of the Constitution, but in the sense that the acts of each shall never be controlled by or subjected directly or indirectly, to, the coercive influence of either of the other departments. James Wilson, one of the framers of the Constitution and a Justice of this Court, in one of his law lectures said that the independence of each department required that its proceedings 'should be free from the remotest influence, direct or indirect, of either of the other two powers.'"

O'Donoghue v. United States, 289 U. S. 516, 553, 77 L. Ed. 1356, 1372.

The District Court's responsibility of imposing a fair and equitable sentence in view of the offense committed and the circumstances surrounding the offense is a judicial responsibility and cannot be avoided upon the assumption that the Executive Department under the Board of Pardons and Paroles will insure a reasonable punishment. To do so, is a direct violation of the principle of separation of powers, and an unconstitutional delegation of judicial responsibility.

As was stated in **Broyles v. Commonwealth of Ky.**, 267 S. W. 2d 73 (Ky. Ct. App. 1954):

> "Under our theory of separation of governmental powers, it is the duty of the judiciary to obtain a conviction of those guilty of a crime. That once that conviction has been obtained, and the sentence imposed, it is the duty of other departments of government to enforce the sentence and to determine when and under what circumstances the prisoner will be eligible for release. **Therefore, when the judiciary attempts to anticipate the rules of the legislature and the Executive Department relating to parole of prisoners, and attempts in effect to circumvent those rules, it infringes upon the prerogatives of other departments of government.**" (Emphasis ours.)

The Court of Appeals earlier had recognized that Title 18 U. S. C. A., § 4208 (a) (2), is not the panacea to cure the ills of harsh and unjust sentences. In **United States v. West Coast News Co.**, 357 F. 2d 855, 866 (6th Cir. 1966), the Court stated:

> ". . . The characters of defendants Aday and Maxey as shown by their earlier criminal conduct give little support to a plea for moderation. It may indeed be that each of them has already exhausted his balance with fate. On the other hand, while we think that the mailing which violated Sec. 1461 calls for separate punishment, we are unable to avoid looking upon the offense which violated Sec. 1462 as so similar in time and place that they would be adequately punished if the five year or lesser terms under these counts be made to run concurrently, but consecutive to the five year sentence under the Sec. 1461 count. Thus, neither defendant could receive any greater prison sentence than ten years. We think, too, that it would be appropriate for the

District Judge to continue his disparate treatment of the defendants by reducing the maxim sentence under 1462 to something less than that imposed upon Aday. **We are not unmindful that 18 U. S. C. A., § 4208 (a) (2), would permit the parole authorities to shorten the time to be served under any sentence, but believe that the courts should by their initial choice fix its limits.''** (Emphasis added.)

It should be here noted that Sec. 4208 (a) (2) does not grant an absolute right of parole at a specific time. It relates solely to the time of eligibility for parole which rests in the discretion of the Board of Parole. A matter of such important consequence to this defendant ought not be left to inference, no matter how certain that inference may appear to be. It is easily possible that under the sentence imposed, the defendant could be required to serve the full term of five years which, as the Court of Appeals has already recognized, is certainly not warranted under the facts and circumstances of this case. This possibility is heightened by the legally inadmissible gossip that is passed to the Executive Department in the presentence report.

2. The consideration by the District Court of the statements contained in the petitioner's presentence report and reliance on such statements in arriving at a fair and just sentence is a flagrant violation of petitioner's constitutional rights and in direct conflict with the opinions of this Court on the subject in Townsend v. Burke, 334 U. S. 736, 68 S. Ct. 1252 and Keenan v. Burke, 342 U. S. 881, 72 S. Ct. 162.

In the defendant's presentence report (R. 18a) (App. p. 28), it is stated:

> ''The defendant's reputation in his home community is quite questionable. It is commonly known and accepted that he dispenses narcotics to any and

everyone who can pay for them. During the past decade, he has been investigated by the Federal narcotics agents, but they have never been able to make a case on him because he keeps records of the narcotics dispensed and defends himself on the basis that his patients require narcotics for medical needs. He is reported to be well-known in the Mid-South for performing abortions at very reasonable rates."

This defendant has never been arrested, tried, or convicted of either of these offenses. Yet, this report, on the basis of hearsay statements and conclusions, made by unknown persons, he has been indicted, tried and convicted of two very serious offenses without the right of ever having faced his accusers and to cross-examine them as to the basis of such statements.

That this report was highly prejudicial to the defendant and certainly influenced the Trial Court in arriving at its conclusions is indicated by the memorandum decision of the Trial Court (R. 28a) (App. p. 35) wherein the Trial Court concludes that the presentence report shows, that aside from the tax fraud offenses, the defendant has been in two respects somewhat less than an exemplary citizen and deserves some rehabilitation, not from income tax evasion alone, but deserves rehabilitation because someone, unknown to the defendant, has advised the probation investigation officer that they believe the defendant has sold narcotics and performed abortions.

To allow such unfounded and hearsay accusations to be used by a trial court in arriving at a proper and a just sentence is a violation of every constitutional protection afforded an individual under the law.

That a sentencing court may hear evidence of prior convictions of criminal offenses in arriving at a proper sentence on the theory that the punishment should fit the offender as well as the offense cannot be denied, nor is

this defendant contending such. But when the Court relies upon hearsay statements accusing a defendant of serious crimes of which he has never been charged, tried or convicted, not only is there obvious unfairness and injustice, but there is such an unconstitutional denial of substantial due process to make the whole sentencing procedure void.

That a Trial Court's reliance upon inaccurate and unfounded information of a defendant's prior criminal record can constitute a sufficient denial of substantial due process to make the sentencing procedure void has been recognized time and time again. The Supreme Court of the United States has so stated:

> "The Trial Court's facetiousness casts a somewhat somber reflection on the fairness of the proceeding. When we learn from the record that actually the charge of receiving the stolen saxophone had been dismissed and the prisoner discharged by the magistrate. But it savors of foul play or of carelessness when we find from the record that, on two others of the charges, which the Court recited against the defendant, he had also been found not guilty. Both the 1933 charge of larceny of an automobile and the 1938 charge of entry to steal and larceny, resulted in his discharge after he was adjudged not guilty. We are not at liberty to assume that items given such emphasis by the sentencing court, did not influence the sentence which the prisoner is now serving.
>
> "We believe that on the record before us, it is evident that this uncounseled defendant was either overreached by the prosecution's submission of misinformation to the court or was prejudiced by the court's own misreading of the record.
>
> ". . . It is not the duration or severity of this sentence that renders it constitutionally invalid; it is the careless or designed pronouncement of sentence

on a foundation so extensively and materially false, which the prisoner had no opportunity to correct by the services which counsel would provide, that renders the proceedings lacking in due process."

Townsend v. Burke, 334 U. S. 736, 741, 92 L. Ed. 1690, 1694.

"The lack of constitutional and evidentiary safeguards thrown around a convicted offender is in striking contrast to those surrounding him before he is found guilty. See **Williams v. N. Y.**, 337 U. S. 69 S. Ct. 1079, 92 L. Ed. 1337; **Friedman v. U. S.**, 8 Cir., 200 F. 2d 690, 697; **Roberson v. Swope**, 9 Cir., 197 F. 2d 633; **United States v. Rosenberg**, 2 Cir., 195 F. 2d 583, 604, et. seq. Yet every lawyer in defending criminal cases knows that often a finding of guilt is a foregone conclusion, and that the real issue centers about the severity of the punishment. . . .

"Further, a convicted offender is not completely beyond the veil of constitutional protection. A sentence imposed by a state court has been held lacking in due process where the defendant was not represented by counsel, and the sentence was imposed by the trial judge under the mistaken belief that the defendant was guilty of other crimes. **Townsend v. Burke**, 334 U. S. 736, 741, 68 S. Ct. 1252, 92 L. Ed. 690; followed in **Keenan v. Burke (Foulke v. Burke)**, 342 U. S. 881, 72 S. Ct. 162, 96 L. Ed. 661. The due process clause of the 5th Amendment protects those convicted in the Federal Courts no less than that of the 14th Amendment protects those convicted in the State Courts. If, as the motion alleges, the defendant had not been convicted of, and had not committed, the crimes about which it is alleged that Agent Neal informed the District Court, and if Agent Neal did in fact give false information as alleged to the District Court, then the defendant's sentence would be

lacking in due process, and subject to attack under § 2255."

Smith v. United States, 223 F. 2d 750, 755 (5th Cir. 1955).

"The situation with respect to securing information to enable the judge to wisely and justly impose sentence procured after conviction or the entry of a plea of guilty, is quite different. In such case, under the technique of Modern Penalogy, the accused who is supposedly entering his plea of guilty in open court or standing in open Court before the judge after verdict, is told that his case is to be investigated before imposition of sentence, and unless he objects, impliedly consents to such investigation. It seems, therefore, perfectly proper for an oral investigation to be made after conviction or plea of guilty, of the accused's reputation, past offenses, economic, social and educational background, and all other matters which a judge should have before him in determining the kind of sentence which should be imposed. Even in such cases, however, any information not received from the accused himself or not given in his presence which might influence the judgment should be called to his attention without necessarily disclosing the source of such information so that he may be afforded an opportunity to object to its use and to rebut the same. Even after conviction or plea of guilty, great care should be exercised to see that the accused understands what is taking place and has, before sentence is imposed, a fair and full opportunity to answer charges made against him.

"If progress is to be made in the administration of criminal law and offenders treated in a scientific manner, such latitude must be left to the judge unless blind and irresponsible judgments are to be imposed. Presentence investigation, after conviction or plea of

guilty, is the most just, effective and humane method, **if properly used**, of arriving at a sentence which will protect both the society and the accused." (Emphasis added.)

Perhaps the best discussion of the principle involved in the instant case is found in **United States v. Pendergrast**, 28 F. Supp. 601 (D. C. Mo. 1939).

"When a defendant has been charged with a given crime, and has entered a plea of guilty to that charge, the punishment assessed should be for the crime charged and that only. The crime charged is, as here, attempted tax evasion, the punishment should be for attempted tax evasion, not a jot or tittle should be added to the punishment because it is judicially noticed that the defendant has been a 'political boss' nor because it is judicially noticed that the city and county which he has dominated has been governed with indescribable corruption and dishonesty. There are those, I know, who think such matters should effect the sentence imposed for attempted tax evasion. They who think so err.

"Congress has said that the most extreme punishment for attempted tax evasion shall be five years imprisonment and a fine of $10,000 for each offense. Here is a standard created by Congress for the guidance of the judges. Congress has said that in that case of attempted evasion in which the circumstances reach the maximum of possible aggravation, the punishment shall be five years imprisonment and a fine of $10,000. The aggravating circumstances conceivable in a tax evasion case are: (a) that the defendant intended to cheat the government of a large, not a trifling amount; (b) that the defendant has been a persistent tax evader; (c) that the defendant in a case in which guilt finally is proved has put the gov-

ernment to enormous expense to prove his guilt, and perhaps added perjury to the offense charged against him. Only the first of these aggravating circumstances is present in this case.

"I gave especially careful consideration to the nature of the offense charged. The attempt to evade the payment of a tax is not a crime *malum in se* as is murder, rape, and theft. It is a crime *malum prohibitum*. Ordinarily, the only penalty for the offense is a civil penalty. In 99 out of 100 cases where it is established beyond any doubt that a citizen has attempted to evade the full payment of his income tax, the government has accepted the tax plus the civil penalty. That is as it should be. But the government of the United States does not compromise for money what is truly and inherently a crime.

"Apparently there was one of the applicable principles upon which I did not sufficiently enlarge on Monday. I said then that if one is charged with attempting to evade the tax and pleads guilty to that charge, he should not be punished for a score of other crimes with which he is not charged and as to which the law presumes his innocence. I thought that principle so obviously was sound that it needed no enlargement.

"Certainly it is within the discretion of the judge to make the sentence small or great in accordance with the mitigating or aggravating circumstances of the crime. But the circumstances which may effect the sentence must be circumstances connected with the crime. For example, if an attempt to evade the tax succeeds previous attempts, admitted or proved, or other previous crimes admitted or proved, that is an aggravating circumstance that should effect the punishment. Again, if the attempt to evade the tax involves substantial amounts, that is an aggravating

circumstance which should effect the punishment. But it is absurd to say that the source from which a citizen receives income, however bad, or the purpose for which he receives it, however evil, is an aggravating circumstance of an attempt by him to avoid payment of all income tax. The two things have no connection whatsoever.

"These principles seem to me now as they seemed on Monday to be true and sound. Perhaps, I should have ignored them in the **Pendergrast** case alone. Perhaps, I should have ignored in that one case precedents and principles and the command of reason. Perhaps, I should have yielded to passion and hatred and revenge. I am glad that I did not yield.

"O'Malley, it appears, lived honorably for more than sixty years. He was honest in his transactions with his fellowmen. Then he became an important officer of the State. In that capacity, he settled with insurance companies a piece of litigation involving millions of dollars. Perhaps he was bribed to make that settlement. For thirty thousand pieces of silver, it may be, he betrayed Missouri. It is likely that the tax he attempted to evade was on the bribe money he had received. But he had not been charged with the taking of a bribe. He could not be charged with that offense in this federal court. He has pleaded guilty to the charge of attempting to evade the tax amounts which are substantial. The punishment will be substantial. He has not pleaded guilty to bribe taking. The simple question is, should he be punished for the crime with which he is charged, and then punished in the same judgment for a crime which is not and could not be charged against him in this court, for which may and should be charged against him in another court? It is a simple question. The only answer possible is an emphatic 'No'."

It may or may not be true that the defendant has dispensed narcotics for other than medical reasons, and has in fact performed abortions, but he has not been convicted of these offenses nor has he ever been so charged. For the court to impose a sentence, influenced by such hearsay accusations is contrary to every principle of fairness and due process which every individual citizen of this country is clothed with from beginning to end of a criminal prosecution.

If the District Court and the Court of Appeals felt that imprisonment for a period of eight months was warranted for the offense of evading income tax and only for the offense of evading income tax, as a possible deterrent to others, that sentence should have been imposed and not the maximum sentence possible with the belief that the parole board would probably release him after a short period of time. As previously stated herein, on a matter of such importance to this defendant, he should not be left to the judicially unsupervised discretion of another agency of government, and particularly when such other agency will read the gossip in the presentence report with lay eyes and give to it a weight and credit to which it is not entitled.

3. Cruel and unusual punishment under the Eighth Amendment to the Constitution of the United States is not confined to the infliction of the death penalty of physical punishment. Sentences which are so disproportionate to the offense charged can be cruel and unusual even though they are within the statutory maximum set by Congress. This principle is one that has been previously touched upon and recognized by this Court and is a principle that is so basic to constitution due process that it should be set to rest once and for all by this Court.

An appellate court, as a general rule, will not impose its judgment upon that of the District Court, and reduce a

sentence imposed so long as the sentence is within the maximum imposed by statute, and the courts have long so held. **Livers v. United States,** 185 F. 2d 807 (6th Cir. 1950); **Costner v. United States,** 271 F. 2d 261 (6th Cir. 1959); **United States v. Gargano,** 338 F. 2d 893 (6th Cir. 1964). This is not to say, however, that this court is without the power to review a sentence which for the offense committed is manifestly excessive.

The courts have long ago, established the principle that long term imprisonments could be so disproportionate to the offense committed to fall within the Eighth Amendment Prohibition of cruel and unusual punishment.

> "We need not pause long to reject the invalid argument of the appellant that the federal statute which he violated inflicts cruel and unusual punishment in controvention of the Eighth Amendment to the Constitution of the United States. **Historically viewed, the Eighth Amendment was adopted to prevent inhuman, barbarous or torturous punishment, though long term imprisonment could be so disproportionate to the offense to come within the inhibition"** (Emphasis added).
>
> **Hemands v. United States,** 164 F. 2d 228 (6th Cir. 1947).

See also **Black v. United States,** 269 F. 2d 38 (9th Cir. 1959).

> "At the outset, let us put to one side the death penalty as an index of the constitutional limit on punishment. Whatever the arguments may be against capital punishment, both on moral grounds and in terms of accomplishing the purposes of punishment—and they are forceful—the death penalty has been employed throughout our history and, in a day when it is still widely accepted, it cannot be said to violate the constitutional concept of cruelty. But it is equally

plain that the existence of the death penalty is not a license to the Government to devise any punishment short of death within the limit of its imagination.

"The exact scope of the constitutional phrase 'cruel and unusual' has not been detailed by this Court. But the basic policy reflected in these words is firmly established in the Anglo-American tradition of criminal justice. The phrase in our Constitution was taken directly from the English Declaration of Rights of 1688, and the principle it represents can be traced back to the Magna Charta. The basic concept underlying the Eighth Amendment is nothing less than the dignity of man. While the State has the power to punish, the Amendment stands to assure that this power be exercised within the limits of civilized standards. Fines, imprisonment and even execution may be imposed depending upon the enormity of the crime, but any technique outside the bounds of these traditional penalties is constitutionally suspect. This Court has had little occasion to give precise content to the Eighth Amendment, and, in an enlightened democracy such as ours, this is not surprising. But when the Court was confronted with a punishment of 12 years in irons at hard and painful labor imposed for the crime of falsifying public records, it did not hesitate to declare that the penalty was cruel in its excessiveness and unusual in its character. **Weems v. United States**, 217 U. S. 349, 54 L. Ed. 793, 30 S. Ct. 544, 19 Am. Cas. 705. The Court recognized in that case that the words of the Amendment are not precise, and that their scope is not static. The Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society."

Trop v. Dulles, 356 U. S. 86, 2 L. Ed. 2d 630, 78 S. Ct. 590.

"It is clear from these cases and the leading interpretation of the Eighth Amendment's basic meaning (**Weems v. United States**, 217 U. S. 349, 30 S. Ct. 544, 54 L. Ed. 793 (1910)), that the prohibition upon cruel and unusual punishment is to be enforced in relation to modern concepts of what constitutes 'cruelty' and what is 'unusual' as of the present time.

" 'Time works changes, brings into existence new conditions and purposes. Therefore a principle, to be vital, must be capable of wider application than the mischief which gave it birth. This is peculiarly true of constitutions. They are not ephemeral enactments, designed to meet passing occasions. They are, to use the words of Chief Justice Marshall, 'designed to approach immortality as nearly as human institutions can approach it.' The future is their care, and provision for events of good and bad tendencies of which no prophecy can be made. In the application of a constitution, therefore, our contemplation cannot be only of what has been, but of what may be.' **Weems v. United States**, supra, at 373, 30 S. Ct. at 551.

"Speaking of this case, Chief Justice Warren said for the United States Supreme Court:

" 'The Court recognized in that case (**Weems v. United States**, supra) that the words of the Amendment are not precise, and that their scope is not static. The Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society' (Footnote omitted). **Trop v. Dulles**, 356 U. S. 86, 100-101, 78 S. Ct. 590, 598, 2 L. Ed. 2d 596 (1958)."

United States v. Dickerson, 337 F. 2d 343 (6th Cir., 1964).

In **United States v. Wiley**, 267 F. 2d 453 (7th Cir. 1959), defendant had plead not guilty to an offense of

receiving stolen property that had been transported in interstate commerce and was convicted. The district judge sentenced the defendant to a period of three years. The Court of Appeals affirmed the conviction but remanded the case for a reconsideration of the sentence. The district judge, as in the instant case, reimposed the same sentence. On the second appeal, the Court of Appeals in setting aside the three year sentence and remanding the case stated:

> "Government counsel in this court urge that the interest of justice is best served when the trial judge acts as a court of last resort on questions of sentencing . . . Only in an exceptional case will this court interfere with the discretion exercised by the district court in imposing a sentence upon a defendant in a criminal case. However, where the facts appearing in the record point convincingly to the conclusion that the district court has without any justification, arbitrarily singled out a minor defendant for the imposition of a more severe sentence than that imposed upon the co-defendants, this court will not hesitate to correct the disparity. In so doing it is exercising its supervisory control of the district court, in aid of its appellate jurisdiction. This control is necessary to proper administration in the federal system. **LaBuy v. Howes Leather Co.**, 352 U. S. 249, 295, 77 S. Ct. 309, 1 L. Ed. 2d 290. This is a control which we are not frequently required to exercise. On this occasion we have done so, not hastily, but with proper intimation in our opinion on the prior appeal of Wiley, as to what course the district court should pursue in disposing of this case on remandment. . . .
>
> "Our part in the administration of federal justice requires that we reject the theory that a person may be punished because in good faith, he defends himself when charged with a crime, even though his

effort proves unsuccessful. It is evident that the punishment imposed by the district court on Wiley was in part for the fact that he had availed himself on his right to a trial, and only in part for the crime for which he was indicted.

"For these reasons, we set aside the three years' sentences imposed and reimposed by the district court on Wiley and we remand this case to that court for a proper sentence not inconsistent with the views herein expressed."

United States v. Wiley, 278 F. 2d 500 (7th Cir.-1960).

There as in the instant case, the district court in pronouncing sentence had considered a factor other than the crime for which the defendant had been charged. There it was the fact that the man exercised his constitutional right to a trial, and in the instant case the district judge was influenced by hearsay statements contained in the defendant's presentence report about crimes for which the defendant had never been charged nor convicted.

The Sixth Circuit Court of Appeals has recognized that it would have the right to review the imposition of a sentence, the length of which was so disproportionate to the offense as to constitute cruel and unusual punishment.

"Upon a mandate going down on the averments of the conviction of these defendants, it would be within the power of the district judge under Rule 35 of the Federal Rules of Civil Procedure to reduce the prison sentences imposed. He can do this *sua sponte* without command from us or motion by the defendants. Because of this, we need not now announce whether we consider that the district judge abused his discretion in imposing the involved sentences, whether we consider that the sentences imposed by the district judge offend the 8th Amendment proscription of cruel

and inhuman punishment. There will be time enough for us to further consider the matter should the district judge conclude not to adopt our suggestion as to reduction of the sentences."

United States v. West Coast News Co., 357 F. 2d 855, 866 (6th Cir. 1966).

In the instant case, the district judge has concluded that he should not adopt the Court of Appeal's suggestion as to the reduction of this sentence, and it is now time for this Court to furnish the relief to which the petitioner has previously been found to be entitled.

CONCLUSION.

This is a tax fraud case which, as these cases go, involves "peanuts." The defendant, a physician, was convicted of attempting to evade only about fifteen hundred dollars a year in incomes taxes. It is very difficult to imagine that a physician would be prosecuted for such a relative triviality if he were not socially vulnerable and therefore an easy target for conviction. There are no aggravating circumstances warranting the imposition of the maximum sentence on each count. See **Pendergrast**, *supra*. Here, the defendant did not attempt to evade a large amount of tax, he is not a persistent tax evader, and he has not put the government to great expense in proving his guilt on some frivolous defense made in bad faith. To the contrary, exactly the reverse is true. He was convicted one time upon a trial that the Court of Appeals held to be in violation of his legal rights. A review of the Court of Appeal's opinion in this case supports the inference that the Court did not find it easy to affirm the conviction on the second trial in the light of the substantial errors assigned, including the clearly improper conduct of the prosecutor during the argument of the case. The Court of Appeals in essence, affirmed the conviction but found

that the defendant ought to be sentenced for attempting to evade fifteen hundred dollars a year over a four year period and not because a part of the income came from the performance of abortions.

Now, the district judge has refused to follow the Court of Appeals direction to reduce the sentence and has given as his reason for this that the Board of Pardon and Paroles can be relied on to insure that the sentence is not of excessive duration. The Court of Appeals has now affirmed that action. The posture of the case now is that unless relief is granted by this Court, the defendant will enter a penal institution and the length of his sentence will be determined by some unknown and judicially unsupervised lay person who will have access to the presentence report with all of the hearsay suspicion and gossip that it contains. How this will affect a laymen depends on the social and religious background of such layman. Likely there is no one who would not disapprove strongly of the improper dispensing of narcotics. Opinions differ as to abortion. If Lord Russell is to be believed, a good abortionist accomplishes more social good than a roomful of preachers. To the contrary, a devout Roman Catholic would conclude that an abortionist should consider himself lucky to get off with five years on each count of the indictment. Which is the high and which is the low end of the moral spectrum is not necessary to be argued here. The point is that a judge should not, and constitutionally cannot, delegate the fixing of a maximum fair sentence to any other agency, and this is particularly so when such agency is likely to be influenced by the very same improper considerations which have affected the whole trial of this case, including, as witness the opinion below, the trial judge himself. Indeed, the recommendation of the Court of Appeals suggest a very short sentence for this relatively petty offense. Modern penology does **not**, as suggested by the trial judge, require that the convicted defendants in these cases re-

ceive a "taste of prison". The most recent work on this subject and the most thorough that has ever been compiled is the report of the President's Commission on Law Enforcement and the Administration of Justice, **"The Challenge of Crime in a Free Society."** Commencing at page 162 thereof, where this problem is discussed, "deterrence" as an aspect of modern penology is not even mentioned. Instead, the old rule, "let the punishment fit the crime," is replaced by a new maxim, "Let the treatment fit the need of the individual offender." p. 163. Our society is finally catching up with Montesquieu who said:

> "The severity of punishment is fitter for despotic governments, whose principle is terror, than for a monarchy or republic, whose spring is honor and virtue. In moderate governments, the love of one's country, shame, and the fear of blame, are restraining motives, capable of preventing a multitude of crimes. Mankind must not be governed with too much severity; we ought to make a prudent use of the means which nature has given us to conduct them; let us follow nature, who has given shame to man for his scourge; and let the heaviest part of the punishment be in infamy attending it. . . ."

This defendant has never been involved in any criminal offense previously and since income tax evaders are statistically among the lowest in the order of recidivism, it is more than a little difficult to see how this defendant "needs" any imprisonment. The trial judge has found that he might need up to five years and it is easily foreseeable that some lay member of the Board of Pardons and Paroles, upon learning that the defendant has been "suspected" of dispensing narcotics and performing abortions, feel that the defendant "needs" the full time for rehabilitation for these offenses even though there is not a line of admissible evidence that he ever was guilty of either. For

a man to be in such indefinite and uncontrolled jeopardy is shocking to all respected concepts of the fair, definite, and certain administration of justice.

Because of the important questions of basic individual rights, this petition for certiorari should be granted.

Respectfully submitted,

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LUCIUS E. BURCH, JR.,

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APPENDIX.